

**In the United States Bankruptcy Court
for the
Southern District of Georgia
Brunswick Division**

In the matter of:

SUSAN S. DICK
(Chapter 7 Case 96-20806)

Debtor

JAMES R. DICK

Plaintiff

v.

SUSAN S. DICK

Defendant

Adversary Proceeding

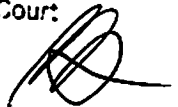
Number 98-2019

FILED

at 9 O'clock & 25 min A.M

Date 9/25/98

MARY C. BECTON, CLERK
United States Bankruptcy Court
Savannah, Georgia



MEMORANDUM AND ORDER

Before the Court is Plaintiff/Husband James R. Dick's complaint to determine dischargeability of obligation owed him by the Debtor/Wife pursuant to a divorce decree. The matter was tried on July 9, 1998. This Court has jurisdiction in this adversary proceeding by virtue of 28 U.S.C. § 1334(b). This adversary is a core proceeding under 28 U.S.C. § 157(b)(2)(I). Based upon the evidence presented at trial and the applicable authorities, I make the following Findings of Fact and Conclusions of Law pursuant to Rule 7052 of the Federal Rules of Bankruptcy Procedure.

FINDINGS OF FACT

Plaintiff and Defendant, formerly husband and wife, were divorced in the Superior Court of Wayne County, Georgia, in August of 1995. The divorce decree incorporated a "Final Agreement," which all issues between the parties regarding child custody, support, alimony, property division, and payment of marital and individual obligations. Section 10 of the agreement provided that on jointly held credit card debt owed to Wachovia, First USA, and Chevy Chase, Husband would pay a total of \$5,000.00 and Debtor would pay the remaining balance. (Pl.'s Ex. A). Husband paid his \$5,000.00 toward these accounts.

After payment of the \$5,000.00, the remaining balances were \$7,665.94 to Wachovia and \$15,714.02 to Chevy Chase, FSB. Defendant filed a Chapter 13 case on July 23, 1996, and converted to a Chapter 7 case on February 10, 1998. Wachovia Bank and Chevy Chase, FSB, each notified Husband of their immediate intent to sue him for the balances owed. Husband paid the Wachovia Bank debt in full in the amount of \$7,665.94 and negotiated a deal with Chevy Chase, FSB, for a reduced amount and paid the sum of \$9,500.00 in full satisfaction of the obligation. Husband cashed in his 401(k) retirement plan to pay these sums.

Husband is obligated to pay \$375.00 per month per child for two children, or \$750.00 per month as child support to Defendant. Husband is also obligated to carry hospitalization, major medical and dental coverage on the parties' children, as well as life insurance on himself for a period of years with the parties' minor children being named beneficiaries thereon.

Debtor/Wife was diagnosed with cancer two years ago and testified that she must undergo medical monitoring for at least ten more years. She pays the sum of \$249.00 per month into a voluntary pension plan, in which she has a vested balance of approximately \$20,000.00 as of July 1998.¹ (Def.'s Ex. 2). Debtor/Wife's Schedule "I," "Current Income" shows receipt of child support in the amount of \$350.00 per month when, in fact, she receives \$750.00 per month. After adjustments for the increased amount of child support and her voluntary payment to the retirement plan, her disposable income is approximately \$500.00 per month. This amount will be reduced by \$375.00 per month in July 1999 when the parties' youngest child reaches age 18. (Pl.'s Ex. A, ¶ 3).

CONCLUSIONS OF LAW

Legal Framework of Domestic Issues in Bankruptcy

¹ The exhibit reveals a vested balance of \$15,150.14 as of June 30, 1997. Based on continued contributions of \$249.00 per month and employer contributions, I estimated the current balance at trial. Neither party objected to the amount or offered more specific evidence.

11 U.S.C. Sections 523(a)(5) and (15) provide:

(a) A discharge under section 727, 1141, 1228[a] 1228(b), or 1328(b)² of this title does not discharge an individual debtor from any debt--

(5) to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree or other order of a court of record, determination made in accordance with State or territorial law by a governmental unit, or property settlement agreement, but not to the extent that--

(B) such debt includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance, or support;

(15) not of the kind described in paragraph (5) that is incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of a court of record, a determination made in accordance with State or territorial law by a governmental unit unless--

(A) the debtor does not have the ability to pay such debt from income or property of the debtor not reasonably necessary to be expended for the maintenance or support of the debtor or a dependent of the debtor and, if the debtor is engaged in a business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business; or

(B) discharging such debt would result in a benefit to the debtor that outweighs the detrimental consequences to a spouse, former spouse, or child of the debtor;

² 11 U.S.C. § 1328(a)(2) excepts Section 523(a)(5) debts but does not except Section 523(a)(15) debts.

The parties stipulated that Section 523(a)(15) controls. Under (a)(15), a non-alimony domestic obligation is excepted from discharge unless debtor establishes one of the two exceptions to the exception.

(a) Section 523(a)(15)(A); Ability to Pay

Under Section 523(a)(15)(A), an obligation arising from a division of property may be discharged if a debtor can demonstrate that she does not have the ability to pay such debt due to other reasonably necessary expenses. In these instances, courts have adopted a twofold analysis. First, using the disposable income test, a court must determine "whether the debtor's budgeted expenses are reasonably necessary." In re Hill, 184 B.R. 750, 755 (Bankr. N.D.Ill. 1995). Second, Section 523(a)(15)(A) requires a court to consider a debtor's "ability to pay." 11 U.S.C. § 523(a)(15). In that regard, a court must view the debtor's general "ability to pay" and not permit the debtor to rely on a "snapshot" of his financial abilities at the time of filing. See In re Smither, 194 B.R. 102, 107 (Bankr. W.D.Ky. 1996) (holding that court must consider prospective earning capacity rather than a snapshot); In re Anthony, 190 B.R. 433 (Bankr. N.D.Ala. 1995). I adopt the holding of my colleague, Chief Judge Dalis, that factors affecting ability to pay include:

- (1) disposable income at the time of trial;
- (2) presence of more lucrative employment opportunities;
- (3) any relief of debt expected in short term; and

- (4) the extent to which the debtor has made a good faith attempt to obtain employment to satisfy the debt.

In re Walford, Adv. Pro. No. 97-01026A (Bankr. S.D.Ga. Aug. 29, 1997). If, after excluding expenses reasonably incurred, a court determines that a debtor does not have the "ability to pay," the debt is discharged. If the debtor has the "ability to pay," debtor still may attempt to discharge the debt pursuant to Section 523(a)(15)(B).

(b) 523(a)(15)(B): Balancing Benefit/Detriment

Under Section 523(a)(15)(B), a debtor may discharge the obligation if it is demonstrated that the benefit of a discharge outweighs the detrimental consequences to the objecting party. This section essentially requires a court to "balance the equities" by considering a number of factors, including income and expenses of both parties; whether the non-debtor spouse is jointly liable on the debts; the number of dependents; the nature of the debts; the reaffirmation of any debts; and the non-debtor spouse's ability to pay. See In re Hill, 184 B.R. at 756; See also In re Adams, 200 B.R. 630 (N.D.Ill. 1996); Taylor v. Taylor, 199 B.R. 37, 41 (N.D.Ill. 1996); In re Custer, 208 B.R. 675, 682 (Bankr. N.D. Ohio 1997); In re Cleveland, 198 B.R. 394, 400 (Bankr. N.D.Ga. 1996); In re Smither, 194 B.R. at 110-11.

In this case I find that the Debtor/Wife has failed to establish either

exception to the discharge exception. With regard to ability to pay, while her disposable income at present of approximately \$500.00 per month would allow her to retire this obligation at a fairly substantial rate, her income will be adversely affected in approximately one year when the parties' youngest child reaches the age of 18. Nevertheless, she does, for the next twelve months at least, have significant disposable income to apply to the indebtedness. More importantly she has the wherewithal, either through cashing in or borrowing against her retirement plan, to pay the entire obligation in full should she make that election. While the Court is not unsympathetic with her desire, given her medical condition and need to provide for secure retirement, not to take this action, this desire is insufficient to negate a finding that she has the ability to pay.


As to the balancing of the equities, I find that the Debtor has failed to prove that the benefit that she would receive from a discharge of these obligations outweighs the detrimental consequences to the ex-husband. Apart from her ability to repay the obligation given her retirement account, the equities are essentially this: her ex-husband, who suffered a substantial reduction in his income of approximately one-half, has cashed in his retirement fund to eliminate virtually all of his debt including the credit card balances which Wife was legally obligated to pay. She has the ability to mirror his action and pay these obligations. When she does, he will recoup some of what he was forced to pay as a co-obligor on the credit cards. Furthermore, she will receive the benefit that he obtained by negotiating a discounted payment on one of the credit cards, from over \$23,000.00 to approximately

\$17,000.00. Since the wife's obligation is to hold the ex-husband harmless, she reaps the benefit of his efforts, and those net savings will remain hers, in her retirement account, or otherwise used to assist with her fresh start.

For the foregoing reasons I conclude that the Debtor's obligations to reimburse the Plaintiff for the sums he paid to Wachovia Bank and Chevy Chase, FSB, are non-dischargeable in these proceedings.

ORDER

Pursuant to the foregoing Findings of Fact and Conclusions of Law, IT IS THE ORDER OF THIS COURT that the obligation for the charge card debts in the total amount of \$17,165.94 in favor of Plaintiff is excepted from discharge and judgment is hereby entered for Plaintiff in the amount of \$17,165.94.



Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This 23rd day of September, 1998.